Supreme Court, U.S.
FILED
JAN 3 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-772

In the Supreme Court of the United States

OCTOBER TERM, 1988

CARA LYN LANDRETH, A MINOR BY AND THROUGH HER GUARDIAN AD LITEM, JOSEPH Y. ORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases:	Page
Arvayo v. *United States*, 766 F.2d 1416 (10th Cir. 1985)	5
Barren v. *United States*, 839 F.2d 987 (3d Cir. 1988)	7
Burns v. *United States*, 764 F.2d 722 (9th Cir. 1985)	6
Camire v. *United States*, 489 F. Supp. 998 (N.D.N.Y. 1980)	5
Casias v. *United States*, 532 F.2d 1339 (10th Cir. 1976)	7
Clark v. *Jeter*, No. 87-5565 (June 6, 1988)	6
Fernandez v. *United States*, 673 F.2d 269 (9th Cir. 1982)	5
Mills v. *Habluetzel*, 456 U.S. 91 (1982)	6
Nemmers v. *United States*, 795 F.2d 628 (7th Cir. 1986)	5
Pittman v. *United States*, 341 F.2d 739 (9th Cir.), cert. denied, 382 U.S. 941 (1965)	4, 5
Simon v. *United States*, 244 F.2d 703 (5th Cir. 1957)	5
Smith v. *United States*, 588 F.2d 1209 (8th Cir. 1978)	5
United States v. *Kubrick*, 444 U.S. 111 (1979)	5, 6
Washington v. *United States*, 769 F.2d 1436 (9th Cir. 1985)	7
Young v. *Haines*, 41 Cal. 3d 883, 718 P.2d 909, 226 Cal. Rptr. 547 (1986)	6

Constitution and statutes:	
U.S. Const. Amend. XIV (Equal Protection Clause)	7
Federal Tort Claims Act:	
28 U.S.C. 1346(b)	2
28 U.S.C. 2401(b)	2, 3, 4, 5, 6, 7
28 U.S.C. 2671 *et seq.*	2

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-772

CARA LYN LANDRETH, A MINOR BY AND THROUGH HER GUARDIAN AD LITEM, JOSEPH Y. ORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the courts below erred in dismissing her damage suit as time-barred under the Federal Tort Claims Act.

1. On March 30, 1973, petitioner, Cara Lyn Landreth, then an 11-month old infant, swallowed a portion of her mother's quibron medication. Petitioner's father and mother, William and Jennie Landreth, rushed her to the Plattsburgh Air Force Base Medical Center in upstate New York.[1] Petitioner was given medication, but no physician examined her or had her stomach pumped to remove the quibron. Petitioner's condition worsened that night, and she was transferred to the Montreal Children's Hospital.

[1] Petitioner's father was a member of the United States Air Force (Pet. Corr. App. A3).

Pet. Corr. App. A3-A4; Pet. Supp. App. D3-D4. Within a week, doctors at the Children's Hospital told the Landreths that petitioner's "seizures were due to the quibron ingestion and that her stomach should have been pumped at the Plattsburgh hospital when she was first taken there" (Pet. Corr. App. A4).

Within several months after the incident, petitioner continued to show signs of injury. For example, petitioner lapsed into temper tantrums and appeared to have retarded communications skills. In 1977 or 1978, petitioner's mother had her examined at the UCLA Neuropsychiatric Institute. Doctors there performed a brain scan and determined that petitioner had suffered brain damage as a result of her ingestion of quibron several years before. During petitioner's treatment at the Institute in 1979, her mother told one of the treating phsyicians that petitioner's problems stemmed in part from her ingestion of quibron. From 1973 until 1979, when Mrs. Landreth petitioned juvenile court for the state to take care of her daughter, petitioner's parents frequently discussed their belief that the United States Air Force was responsible for petitioner's problems because personnel at the Plattsburgh Medical Center had not pumped her stomach as soon as she was taken to the emergency room. Pet. Corr. App. A4-A5; Pet. Supp. App. D4-D7.

2. On September 6, 1983, petitioner filed an administrative claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671 *et seq.*, alleging that Air Force personnel had negligently caused her physical and emotional injuries. On May 15, 1984, the Air Force rejected the claim as time-barred under 28 U.S.C. 2401(b).[2]

[2] Section 2401(b) of Title 28 provides in pertinent part:

> A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues * * *.

On November 7, 1984, a guardian ad litem was appointed for petitioner who, on that date, filed this action under the FTCA in the United States District Court for the Central District of California. Pet. Corr. App. A4; Pet. Supp. App. D2-D3.

The district court granted the government's motion to dismiss the complaint (Pet. Supp. App. D1-D9). The court first recognized that "[f]or purposes of determining the accrual date of [petitioner's] claim, the knowledge of her parents is imputed to her" (*id.* at D8). The court then found that "[u]nder the most generous reading of the facts[,] Jennie and William Landreth knew that the acts or omissions of the Air Force may have caused [petitioner's] injuries by at least 1979" (*ibid.*). Petitioner had not filed her administrative claim until 1983. The court accordingly dismissed the action as untimely under 28 U.S.C. 2401(b).

3. The court of appeals affirmed (Pet. Corr. App. A1-A12). It initially observed that a medical malpractice cause of action under the FTCA accrues when the claimant is aware of the injury and its probable cause, although perhaps not realizing that he has an enforceable claim (*id.* at A5). The court also recognized that "any knowledge [petitioner's] parents had of [her] injuries and the cause of her injuries is imputed to her" (*id.* at A6). "The fact of minority does not toll the statute [of limitations]," the court concluded, in part because "the minor's parents have a legal duty to take action on the child's behalf" (*ibid.*). Here, the record supported the district court's finding that petitioner, through her parents, was aware no later than 1979 that Air Force personnel may have caused her injuries. The court of appeals accordingly agreed that petitioner's claim was time-barred under the FTCA.[3]

---

[3] The court of appeals rejected petitioner's constitutional argument that the statute of limitations should have been tolled until a guardian

4. In this Court, petitioner does not challenge the factual finding that by 1979 her parents were aware of the negligence claim against the Air Force. Nor does petitioner dispute the legal conclusion that the FTCA bars her claim if her parents' knowledge is imputed to her. Rather, petitioner argues (Pet. 8-13) that fundamental principles of due process and equal protection mandate that their knowledge not be imputed to her, since her parents may have chosen not to file a timely claim because of their own conflict of interest.[4] The courts of appeals, however, have

---

was appointed for her because her parents had a conflict of interest in pursuing the claim. The court reiterated that petitioner's parents "had a clear duty to preserve their child's claim by timely action" (Pet. Corr. App. A7), and concluded that prior precedent foreclosed relief on petitioner's claim (*id.* at A7-A8 (citing *Pittman* v. *United States*, 341 F.2d 739 (9th Cir.), cert. denied, 382 U.S. 941 (1965)).

Judge Reinhardt dissented (Pet. Corr. App. A9-A12). He criticized the majority's treatment of petitioner's constitutional claim—a claim which, in his view, raised factual and legal questions requiring a remand to the district court.

[4] Even assuming Section 2401(b) may be construed as exempting certain claims on behalf of minors from its strict requirements, petitioner failed to present sufficient facts to withstand the government's motion to dismiss. The relevant evidence in this case—the statements of petitioner's parents—does not support the premise of petitioner's claim, namely, that her parents failed to file a timely claim because of a "conflict of interest clearly established in the record below" (Pet. 10). Instead, the record shows that the claim was filed in 1983 after petitioner's mother consulted with an attorney. See R.E. C.R. 8, at 23-24 ("R.E." refers to the Record Excerpts filed with petitioner's brief in the court of appeals); Deposition of Jennie Landreth at 69-73, Gov't Supp. R.E. (unpaginated) ("Gov't Supp. R.E." refers to the Supplemental Record Excerpts filed with the government's brief in the court of appeals); Deposition of William Landreth at 80-81, Gov't Supp. R.E. Indeed, the statements of both parents contain no suggestion that they chose not to file a claim sooner because of a concern about their own potential liability. Moreover, according to petitioner, "[u]nder both California and New York law, [her] parents would have

uniformly held that, for purposes of applying the FTCA's two-year statute of limitations, a parent's awareness of the claim must be imputed to the minor.[5] We have found no case, and petitioner cites none, where a court has tolled the FTCA's limitations period for a minor because his parents' possible negligence itself created a conflict of interest. This lack of support is not surprising. Courts could not embrace this exception to the FTCA without undermining "the balance struck by Congress in the context of tort claims against the Government * * * [because they] are not free to construe [28 U.S.C. 2401(b)] so as to defeat its obvious purpose, which is to encourage the prompt presentation of claims." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979); see *Pittman* v. *United States*, 341 F.2d 739, 740-741 (9th Cir.) ("Congress * * * did not want stale claims lying around under the Federal Tort Claims Act"), cert. denied, 382 U.S. 941 (1965).[6]

---

the right to an action for indemnity against the government. * * * This cause of action would permit [her] parents to seek total indemnity against the government for the malpractice performed on [petitioner], for which they would be legally liable" (Pet. 12-13 (citations omitted)). Thus, petitioner's own statement suggests that an alleged conflict of interest could not have been an objectively reasonable cause for failing to pursue the claim in a timely manner. Accordingly, the lack of any factual basis for petitioner's principal contention is an independent reason against further review by this Court.

[5] *E.g.*, *Fernandez* v. *United States*, 673 F.2d 269, 271-272 (9th Cir. 1982); *Smith* v. *United States*, 588 F.2d 1209, 1211 (8th Cir. 1978); *Pittman* v. *United States*, 341 F.2d 739, 740-741 (9th Cir.), cert. denied, 382 U.S. 941 (1965); *Simon* v. *United States*, 244 F.2d 703, 704-706 (5th Cir. 1957); see *Nemmers* v. *United States*, 795 F.2d 628, 629 (7th Cir. 1986); *Arvayo* v. *United States*, 766 F.2d 1416, 1421-1423 (10th Cir. 1985); *Camire* v. *United States*, 489 F. Supp. 998, 1000 (N.D.N.Y. 1980).

[6] Petitioner also contends (Pet. 6-7) that applying the two-year limitations period to bar her claim, under the "legal fiction" that im-

Petitioner mistakenly relies (Pet. 8) on cases such as *Mills* v. *Habluetzel*, 456 U.S. 91 (1982), and *Clark* v. *Jeter*, No. 87-5565 (June 6, 1988), as calling for her expansive reading of Section 2401(b) in order to protect the constitutional rights of minor claimants. Those decisions, however, involved statutes of limitations that discriminated among children on the basis of illegitimacy. Here, the statute of limitations applies to all FTCA claimants and draws no distinction that would call for heightened scrutiny. See *Clark* v. *Jeter*, slip op. 4-5.[7] Moreover, those decisions held that "[t]he period for asserting the right [at issue] must be sufficiently long to permit those who normally have an interest in such children to bring an action on their behalf * * *." *Mills* v. *Habluetzel*, 456 U.S. at 97; see *Clark* v. *Jeter*, slip op. 5. The rationale of those decisions thus squarely refutes petitioner's constitutional claim; allowing the minor's parents or legal guardian two

---

putes the parents' knowledge to their minor child, violates the federal courts' equitable duty "to avoid absurd or glaringly unjust results" (*id.* at 6). The FTCA, including its applicable statute of limitations, is a limited waiver of the immunity of the United States from specific causes of action. This Court has made clear that a court "should not take it upon [itself] to extend the waiver beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979). Section 2401(b) by its terms carves out no exception for claims on behalf of minors and there is nothing in the legislative history to support such a reading of that provision. Under the circumstances, traditional notions of equity do not authorize a court to ignore the jurisdictional bar created by Congress. *E.g.*, *Burns* v. *United States*, 764 F.2d 722, 724 (9th Cir. 1985); see *United States* v. *Kubrick*, 444 U.S. at 125 ("It goes without saying that statutes of limitations often make it impossible to enforce what were otherwise perfectly valid claims. But that is their very purpose, and they remain as ubiquitous as the statutory rights or other rights to which they are attached or are applicable.").

[7] For this reason, petitioner's passing reliance (Pet. 12) on *Young* v. *Haines*, 41 Cal. 3d 883, 718 P.2d 909, 226 Cal. Rptr. 547 (1986), is misplaced. That case involved a state statute of limitations that, under

years to file a claim after becoming aware of the injury and its probable cause provides an adequate opportunity to protect the minor's interests without compromising the government's interest in avoiding the litigation of stale claims.

Finally, petitioner contends (Pet. 9-10) that the court of appeals' holding amounts to a violation of the Equal Protection Clause because courts have tolled the FTCA's statute of limitations for similarly situated adult claimants. Each of those cases, however, involved a court's tolling the statute of limitations for the period in which the adult claimant was in a coma allegedly stemming from the government's negligence; to hold otherwise would have allowed the government to profit from its allegedly negligent conduct. See, *e.g.*, *Washington* v. *United States*, 769 F.2d 1436, 1438-1439 (9th Cir. 1985) (discussing cases). Here, the government's allegedly negligent conduct posed no impediment to the filing of petitioner's claim. Instead, as a minor required to rely on her parents to pursue her claim, petitioner is in a position analogous to that occupied by adults with mental incapacities that preceded the government's alleged negligence. Under those circumstances, courts have not hesitated to hold claimants to the two-year limitations period. See, *e.g.*, *Barren* v. *United States*, 839 F.2d 987, 992 (3d Cir. 1988); *Casias* v. *United States*, 532 F.2d 1339, 1342 (10th Cir. 1976). Petitioner has thus received the same protection and process accorded to similarly situated minor and adult plaintiffs.

---

one possible reading, treated adult plaintiffs more favorably than minors. The California Supreme Court rejected that reading and interpreted the statute to apply neutrally to adult and minor plaintiffs, thus avoiding the necessity of reaching state or federal constitutional questions. See 41 Cal. 3d at 896-901, 718 P.2d at 916-919, 226 Cal. Rptr. at 554-557. Thus, the principle of *Young* is consistent with the straightforward application of Section 2401(b) adopted by the courts below.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JANUARY 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241 699/00040